Tentative Rulings for January 23, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

11CECG04052 ***Lovin Oven, LLC v. Campos Bros. Farms*** **(Dept. 403)**

10CECG00813 ***South Fresno Housing, LLC, v. Myron Smith, et al.*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG01182 ***Bonnie Caglia, et al. v. Club One Casino*** **is continued to Wednesday, February 6, 2013 at 3:30 p.m. in Dept. 403.**

10CECG02169 ***Western v. Save Mart*** **is continued to Wednesday, January 30, 2013 at 3:30 p.m. in Dept. 402.**

11CECG02432 ***Sarantos v. Club One Acquisition Corp.*** **is continued to Wed. Feb. 6, 2013 at 3:30 p.m. in Dept. 503.**

10CECG03180 ***Vartanian v. Vartanian*** **is continued to Wed. Feb. 6, 2013 at 3:30 p.m in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(19) **Tentative Ruling**

Re: ***Cortina v. North American Title Company***
Superior Court Case No. 07CECG01169

Hearing Date: January 23, 2013 (Department 402)

Motion: by plaintiffs for order compelling discovery verifications

Tentative Ruling:

To grant as to the discovery found in Exhibits G, I, K, L, M, O, P, R, U, V, W, Z, and BB. To deny as to the rest. To deny sanctions.

Explanation:

As noted by plaintiff, responses do not require a verification where they consist solely of objections. Code of Civil Procedure sections 2030.250 and 2031.250. The Declaration of Mr. Kopfman attaches Exhibits A through DD, most of which are missing pages of the responses. It is moving parties' burden to show the necessity of a verification, and only Exhibits G, I, K. L, M, O, P, R, U, V, W, Z, and BB contain factual matter in response to a discovery query that requires an oath.

The other exhibits either show only objections or omit the entirety of any responses and fail to meet moving parties' burden of proof. Much of the motion is therefore invalid, and the amount of sanctions sought does not appear until well into the points and authorities. Sanctions are not warranted in these circumstances, and proper notice was not provided for them.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/22/13.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Wells Fargo v. Millhollin***
Superior Court Case No. 12CECG00367

Hearing Date: January 23, 2013 (Department 402)

Motion: by receiver for discharge of receiver, approval of final report, and permission to turn over property to Deena Millhollin

Tentative Ruling:

To continue to February 5, 2013, 3:30 p.m., in this Department to obtain the Family Court ruling. To order that the receiver continue to maintain the property abandoned by plaintiff until further order of this Court.

Counsel for Glenn Millhollin shall file a copy of any order or ruling made in the family law matter by February 14, 2013, and provide a courtesy copy of that filing directly to Department 402.

Explanation:

The equipment that the receiver proposes to turn over to Deena Millhollin is property at issue in a family law dispute, Fresno Superior Court Case No. 07CEFL04984. Glenn Charles Millhollin contends that a hearing on a motion concerning such property is pending in the family law case, and a hearing in set in the family law case for January 8, 2013 was continued to February 5, 2013.

The family law court is the appropriate venue for resolution of ownership and/or control issues over that equipment. *Neal v.* Superior Court (2001) 90 Cal. App. 4th 22; *Burkle v. Burkle* (2006) 144 Ca. App. 4th 387; and *In re Marriage of Schenck* (1991) 228 Cal. App. 3d 1474.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/22/13.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Rojas v. River Ridge Partners***
Superior Court Case No. 10CECG02305

Hearing Date: January 23, 2013 (Department 402)

Motion: by defendants Generation Homes, River Ridge Partners I, II, and III to bifurcate Terry Tuell Concrete from the pre-trial orders

Tentative Ruling:

To deny.

To order that order that the parties meet and confer and if they cannot agree on a new special master/discovery referee, that each party submit the names of three referees, along with their business address, telephone number, hourly rate, and daily minimums (if any), as well as indication if the parties have contacted that referee and he or she is available for appointment.

Either an agreement with proposed order or the proposed appointments shall be filed on or before February 7, 2013 and served on all other parties electronically. Any objection to a proposed referee under Code of Civil Procedure section 641 by any party to any proposed referee shall be filed on or before February 14, 2013 and served on all parties electronically. A hearing for the purpose of appointing a referee will be held at 3:30 p.m. in Department 402 on February 21, 2012.

Explanation:

The challenge filed by Terry Tuell Concrete ("TTC") to Mr. Najarian was timely. See *Stephens v. Superior Court* (2002) 96 Cal. App. 4th 54, 60. The fact that the developer defendants did not insist on a default or answer for that cross-defendant does not change the requirements for filing of a challenge under Code of Civil Procedure 170.6. Once that challenge was filed and accepted, Mr. Najarian may not serve as a special master/discovery referee in this case, even if TTC were dismissed the day after the challenge were filed. See *Louisiana-Pacific Corp. v. Philo Lumber Co.* (1985) 163 Cal. App. 3d 1212, 1219:

> "The law is clear that when a party properly makes a motion under section 170.6 and the judge against whom it is directed fails to disqualify himself from hearing the matter before him, his action thereon and his subsequent orders and judgment are null and void. It follows, then, given the fact that no 'determination' is made that actual prejudice exists in the case of a peremptory challenge, that if such a challenge is properly made it becomes effective immediately."

So bifurcation cannot accomplish what the parties want. Going forward with a disqualified referee would make all further rulings by him null and void, and that would be a massive waste of judicial resources and the parties' time and money.

Code of Civil Procedure section 638(b) states:

"If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court shall appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee."

It is now time to proceed with that process, as set forth above.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/22/13.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Ortiz v. State Farm***
Superior Court Case No. 11CECG001936

Hearing Date: January 23, 2013 (Department 402)

Motion: by defendant State Farm Mutual Auto. Ins. Co. for Summary Judgment

By plaintiff for summary judgment

Tentative Ruling:

To grant defendant's motion and declare that the any payments received by the insured plaintiff for his injuries serves to reduce the underinsured motorist limits of coverage, reducing the limits in this case for the accident at issue to $0.

To deny plaintiff's motion.

Explanation:

1. Legislature's Intent Governs

Insurance Code section 11580.2(h)(1) states, in its pertinent part: "Any loss payable under the terms of the uninsured motorist endorsement or coverage to or for any person may be reduced: (1) By the amount paid and the present value of all amounts payable to him or her, his or her executor, administrator, heirs, or legal representative under any workers' compensation law, exclusive of nonoccupational disability benefits."

State Farm's policy instead states that the "Limits of Liability Under Coverage U" are: ". . . any amount payable under this coverage shall be reduced . . . by any amount paid or payable to or for the insured . . . any workers' compensation."

State Farm correctly points out that there is case law stating the effect of such language is a reduction to the limits of coverage, not the loss by the injured party. Under this authority, a $100,000 payment by workers compensation reduces a $100,000 limit on the insurance with this case to $0, even if the total liability to the injured party is $500,000.00. See *McGreehan v. CSAA* (1991) 235 Cal. App. 3d 997.

The problem with that appellate opinion is that it rests on a contractual intent analysis, taking each part of the policy to interpret the other parts. That analysis is appropriate where the contractual provision in controversy is drafted by the parties.

Here, however, the operative clauses derive from statute. Where the insurance contract provision proceeds from a statute, it is the Legislature's intent that governs, not general rules of contract law. See *J.C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal. 3d 1009, 1020, refusing to use contract interpretation rules in reviewing policy

language mandated by Insurance Code section 533. Although the *McGreehan* case was decided after *J.C. Penney*, it does not mention the Supreme Court's rejection of use of contract rules to interpret statutory provisions.

Further, the California Supreme Court has since held that where policy language is statutorily mandated, an insurer cannot rely on other language it inserted in a policy to undermine the Legislature's intent in requiring certain language. In 2000, the Supreme Court found that an insurer breached a contract of disability insurance by attempting to use policy language to limit its duty to pay claims after two years under statutory language required by Insurance Code section 10350.2.

See *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal. 4th 368, 375: "[T]he particular incontestability clause the Legislature has mandated for disability policies . . . takes precedence over other language in the policy."

2. A Policy Provision is Read to Conform to the Law

Where a provision in an insurance policy is statutorily required or conflicts with statutory requirements, the policy is read (and enforced) as if it did comply with law, as held in *Galanty*, *supra*. It is not "void," as argued by plaintiff. See *Cal-Farm Ins. Co. v. Fireman's Fund* (5th Dist., 1972) 25 Cal. App. 3d 1063, 1071.

> "[T]he effect of our holding is to automatically amend the policy provision to conform to the requirements of the statute. This we are authorized to do not only by virtue of the express provisions of the policy itself above referred to but by virtue of the legal principles independent of the policy provision (compare: Civ. Code, @ 1643)."

3. The Legislature's Intent Here

The answer here to the Legislature's intent is found in Insurance Code section 11580.2 itself. The first issue that crops up is that subsection (h) of section 11580.2 of the Insurance Code applies to ***un***insured coverage. We are not dealing with an uninsured motorist. We are dealing with an ***under***insured motorist. That is discussed in subsection (p) of the statute.

The case cited by plaintiff for the proposition that uninsured and underinsured coverage are treated the same says the opposite, at the page cited by plaintiff. See *Quintano v. Mercury Casualty Co.* (1995) 11 Cal. 4th 1049, 1053: "Significantly, section 11580.2(p) also provides that to the extent its terms conflict with provisions of section 11580.2, subdivisions (a) through (o), terms of subdivision (p) prevail." The Court there further said (at page 1054):

> "Of particular import in this case is section 11580.2(p)(3) which limits when coverage arises for underinsured motorist claims. It provides: 'This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage.' "

For ***under***insured coverage, subsection (p)(4), states:

> "When bodily injury is caused by one or more motor vehicles whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury."

Insurance Code section 11580.2(p)(4) makes clear that we start from the underinsured motorist limits, $100,000, and subtract payments by other liable parties, to come to a figure owed by State Farm. The other driver paid $15,000. The workers compensation insurer paid out $107,000.00 to the insured for that same injury. State Farm's "maximum liability" is then $0.

Further, case law states that subsection(h) does not conflict with subsection (p)(4) even if (p)(4) is read as limited to other motor vehicle liability policies. That means that the reduction for workers compensation benefits actually paid to the insured is permissible. See *Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal. App. 3d 948, 953-954, confirmed by *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal. 4th 318, 331-332.

It further appears from further statutory language that the Legislature did mean to prevent even large recoveries that did not constitute "double recoveries." Insurance Code section 11580.2(q) states:

> "Regardless of the number of vehicles involved whether insured or not, persons covered, claims made, premiums paid, or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two more policies be added together, combined, or stacked to determine the limit of coverage available to injured persons."

That is a pretty clear statement of Legislative intent to forbid the insured from making him or herself "whole" out of insurance payments exceeding the limit of his uninsured and/or underinsured coverage. Adding the workers compensation benefits to the underinsured coverage here is stacking – workers compensation comes from another who is legally liable for the injury. See, e.g., *Mercury Ins. Co. v. Vanwanseele-Walker* (1996) 41 Cal. App. 4th 1093.

The language of Insurance Code section 11580.2 shows that the Legislature intended that plaintiff recover nothing under the State Farm policy if more than $100,000 was obtained from other parties liable for the injury. In this case, more than $100,000 was recovered from the negligent driver and the insured's employer, leaving no coverage left under the underinsured provisions of Ortiz' State Farm policy.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/22/13.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Linda Reyes, et al. v. Jason Lee Martin***
Court Case No. **11CECG00405**

Hearing Date: **January 23, 2013 (Dept. 402)**

Motion: Petition to Approve Compromise of Disputed Claim of Person with a Disability

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Explanation:

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/22/13.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Kaweah Container, Inc. v. Jet Plastica Industries, Inc.***
Superior Court Case No.: 12CECG01081

Hearing Date: January 23, 2013 (**Dept. 403**)

Motion: By Plaintiff Kaweah Container, Inc., for summary adjudication of the eighth cause of action for breach of contract against Defendant Jet Plastica Industries, Inc.

Tentative Ruling:

To grant, with Plaintiff to submit a proposed order that complies with Code of Civil Procedure section 437c, subdivision (g), pursuant to California Rules of Court, rule 3.1312.

Explanation:

Plaintiff Kaweah Container, Inc., has met its burden to show there is no triable issue of material fact concerning the eighth cause of action for breach of contract alleged against Defendant Jet Plastica Industries, Inc. In fact, on January 9, 2013, Defendant Jet Plastica Industries, Inc., filed a notice of non-opposition to the motion. Therefore, the motion for summary adjudication of the eighth cause of action for breach of contract will be granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/18/2013.
(Judge's initials) (Date)

[10]

Tentative Ruling

Re: ***In re: Steven Yockey***
Superior Court Case No. 12 CECG 03371

Hearing Date: Wed., Jan. 23, 2013 (**Dept. 403**)

Motion: Petition to Compromise Minor's Claim for Steven Yockey

Tentative Ruling:

Order Approving Compromise and Order to Deposit Money signed. Hearing off calendar. No appearances necessary.

Counsel is ordered to forward to the depository a Receipt and Acknowledgment on Judicial Council form MC-356, along with a signed copy of the Order to Deposit. Once the depository has signed the Receipt, counsel shall file the completed Receipt with the court, within 30 calendar days of the clerk's service of the minute order.

Explanation:

Pursuant to CRC 3.1312(a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/22/13 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(18)

Tentative Ruling

Re: ***Dae and Sook Lee v. City of Fresno, et al.***
Case no. 12CECG00640

Hearing Date: **January 23, 2013 (Dept. 501)**

Motion: By defendants City of Fresno and PBID Partners of Downtown Fresno, for attorneys' fees following the court granting defendants' special motion to strike each cause of action in plaintiff's complaint (anti-SLAPP motion)

Tentative Ruling:

To award attorney fees to defendants in the amount of $11,507.50.

Explanation:

The motion is timely filed

On October 2, 2012 the court issued an order that granted defendants' anti-SLAPP motion. The court served the order on October 3, 2012. Plaintiff filed a notice of appeal with the court on November 14, 2012. "Even if the order granting the [special motion to strike] has been appealed, the trial court retains jurisdiction to entertain a motion for attorney fees." (*Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, 461.)

Plaintiff contends as follows in arguing that defendants' motion for attorney fees is not timely filed: California Rules of Court (CRC) rule 3.1702(b) requires that the separate motion for fees must be served and filed within the time limits for filing a notice of appeal; defendants were required to file their motion for attorney fees within the time limit that plaintiff has to file an appeal, namely 60 days; the deadline for defendants to fie and serve their motion was December 2, 2012; and the motion was filed and served on December 12, 2012.

Contrary to plaintiff's assertions, the motion is timely filed. "A motion for attorney fees incurred in connection with a prejudgment appealable order, such as an order granting or denying a special motion to strike, is a "claim for services" rendered before "the rendition of judgment." It is not a claim "for services up to and including the rendition of judgment," and therefore does not fit within the plain language of rule 3.1702." (*Jack In The Box, supra*, 151 Cal.App.4th at 464.) "The term 'appealable order' does not appear in rule 3.1702. The issue concerning the rule's applicability to appealable orders arises because subsection (b)(1) of rule 3.1702 refers to other rules—

rules 8.104 and 8.108—which define the term "judgment" to include appealable orders under certain circumstances. The reference in rule 3.1702(b)(1) to rules 8.104 and 8.108 gives rise to an ambiguity in the meaning and application of rule 3.1702 that requires us to consider the rule's drafting history, as well as its purpose and intent." (*Ibid.*) "The history of rule 3.1702 indicates that the "outside" time limit for claiming prejudgment statutory attorney fees was intended to be entry of a final judgment—not entry of a prejudgment appealable order. (*Jack in the Box, supra,* 151 Cal.App.4th at 850.) Thus, "the time limits imposed by rules 3.1702 and 8.104 for filing a motion for attorney fees under section 425.16, subdivision (c) do not commence to run until entry of judgment at the conclusion of the litigation. (*Id.* at 851.)

Reasonableness of attorneys' fees requested

Any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) Courts generally apply a lodestar approach (*i.e.*, number of hours reasonably expended multiplied by the reasonable hourly rate prevailing in the community for similar work) in setting a fee award under CCP section 425.16. (*Id.* at 1136.)

In ¶18 of his supporting declaration, counsel for defendant, Mr. Kinsey, represents that of the total fees incurred in the amount of $15,001.00, $10,993.50 was incurred in connection with the initial preparation of the motion and the filing and briefing in federal district court. Mr. Kinsey attaches a copy of the federal court remand order to his declaration. That order states, in relevant part, that "[a]ll parties shall bear their own costs and attorneys' fees related to the removal and remand of this action." Only $4007.50 was incurred in connection with modifying the anti-SLAPP motion for filing in this court.

The legislative history of CCP section 425.16 shows it was intended to allow only fees and costs incurred on the motion to strike (not the entire litigation). (*Lafayette Morehouse, Inc. v. Chronicle Pub. Co.* (1995) 39 Cal.App.4th 1379, 1383.) In short, the award of fees is designed to " 'reimburs[e] the prevailing defendant for expenses incurred in extracting herself from a baseless lawsuit' " (Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi (2006) 141 Cal.App.4th 15, 22), not to reimburse the defendant for all expenses incurred in the baseless lawsuit.

Therefore, the court deducts $10,993.50 from the amount of fees requested, and otherwise finds the fees requested are reasonable.

Pursuant to CRC rule 3.1312, and CCP section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/22/2013.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Penrose v. Gregory et al.***
Unlimited Civil Case No. 11CECG01041

Hearing Date: January 23, 2013 (Dept. 501)

Motion: First American's Demurrers to the Second Amended Complaint

Tentative Ruling:

To sustain the general demurrer to the ninth cause of action with leave to amend. To overrule the general demurrers to the tenth, eleventh and twelfth causes of action. To sustain the special demurrer to the thirteenth cause of action for failure to state whether the contract is written or oral and otherwise overrule the general demurrer.

Explanation:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Rylaarsdam & Edmon, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2011) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Ninth Cause of Action – Negligence – General Demurrer

First American contends that plaintiffs allegation of liability that First American had a duty to "exercise reasonable care in identifying and providing any exceptions to the Subject Property of Plaintiff's preliminary Title Report" cannot stand based on the rule set forth in *Southland Title Corp. v. Superior Court* (1991) 231 Cal.App.3d 530 (*Southland*). The appellate court in *Southland* held that the failure of a preliminary title report to disclose an easement could not serve as the basis for "abstractor negligence" against the title company. (*Id*. at p. 536.)

Plaintiffs agree that First American cannot be held liable for a negligently prepared preliminary title report, but contend that they can be held liable for negligently provided escrow services. When an escrow holder is negligent in the performance of a service as an accommodation, his or her duties and obligations are measured by the general rules applicable to an escrow holder's strict duty to follow instructions, and the escrow holder will be liable to the principal if he or she performs duties negligently. (*Seeley v. Seymour* (1987) 190 Cal. App. 3d 844, 862.) However, the ninth cause of action fails to allege that the escrow services were provided for free. Typically, the relationship between the escrow service and the principals is contractual. The parties are only entitled to the performance that is provided in their instructions and the escrow holder is only obligated to perform in accordance with instructions from the

parties to the escrow. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*. (2002) 27 Cal. 4th 705, 711.)

Furthermore, it is apparent from paragraph 102 of the Second Amended Complaint that a policy of title insurance was, in fact, issued to plaintiffs, and thus a negligence claim can be based on the policy of title insurance. As it stands however, the ninth cause of action fails to mention the title insurance policy.

Accordingly, the court sustains the general demurrer to the ninth cause of action with leave to amend.

Tenth Cause of Action – Fiduciary Duty – General Demurrer

A breach of fiduciary duty involves "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) An escrow holder is an agent and fiduciary of the parties to the escrow. (*Summit*, *supra*, 27 Cal.4th at p. 711, citing *Amen v. Merced County Title Co*. (1962) 58 Cal.2d 528, 534.) The tenth cause of action asserts the fiduciary duty between plaintiffs and First American was breached when First American "fail[ed] to disclose its prior actions and prior participation with Defendants in the subdivision of the Subject property." (SAC ¶ 89.)

First American argues that it is "settled precedent" that an escrow holder does not have a duty to disclose any information that the escrow holder acquired in a separate escrow to a principal that was not a party to that escrow, citing *Far West Savings & Loan Assn. v. McLaughlin* (1988) 201 Cal.App.3d 67 and *La Mancha Dev. Corp. v. Sheegog* (1978) 78 Cal.App.3d 9. These cases are inapposite. They provide that all parties to an escrow are chargeable with notice of the papers in that escrow. "When there are two escrows, the doctrine of imputed knowledge has no application to documents deposited in the escrow to which the party sought to be charged with notice was not a participant." (*La Mancha Dev. Corp. v. Sheegog*, *supra*, 78 Cal.App.3d at p. 16.)

The tenth cause of action properly pleads a cause of action for breach of fiduciary duty by alleging that the same agent of First American who wrote the subdivision deed with the conditional compliance statement on it was the agent for their own transaction, yet failed to disclose that the property had been divided without complying with the conditional compliance statement. The general demurrer to this cause of action is overruled.

Eleventh Cause of Action – Civil Conspiracy – General Demurrer

"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design." (*Applied Equip. Corp. v. Litton Saudi Arabia* (1994) 7 Cal.4th 503, 511.) In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed

pursuant to that agreement, and that there was resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 47.)

First American maintains it cannot commit civil conspiracy because it owed no duty to plaintiffs under any theory. "[T]ort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at p. 511; see also *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.)

Because First American owed plaintiffs a fiduciary duty, this cause of action states facts sufficient to maintain a claim for civil conspiracy. The demurrer to this cause of action is overruled.

Twelfth Cause of Action – Bus. & Prof. Code § 17200 – General Demurrer

Conduct violating the UCL includes "any unlawful, unfair or fraudulent business act or practice ... ." By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163, 180.) "Unfairness" under section 17200 has been described as violating established public policy or "is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*McKell v. Washington Mutual, Inc*. (2006) 142 Cal.App.4th 1457, 1473.) Violating fiduciary duties is sufficient to state a UCL claim. (*Roskind v. Morgan Stanley Dean Witter & Co*. (2000) 80 Cal.App.4th 345, 354, fn. 4.)

Thirteenth Cause of Action – "Contractual Indemnity/Breach of Insurance Policy Agreement"

General Demurrer

First American does not attack the elements of either an indemnity cause of action or a breach of contract cause of action, but rather argues that the allegations of the thirteen cause of action fail to state a claim because paragraph 102 alleges that the title insurance was based on a preliminary tile report which had specific exclusions for Subdivision Map Act violations.

First American notes that Exhibit I to the Second Amended Complaint, the preliminary title report, states that one of two types of tile insurance policies would be issued, a 1998 CLTA/ALTA (Eagle) Policy with ALTA Expanded Coverage Residential (Eagle Policy (10/31/01) or 1992 ALTA Standard Owner's Policy with Regional Exceptions and ALTA Endorsement Form 1. Both these policies expressly exclude coverage for "loss, costs fees, and expenses for governmental police power, including laws, ordinances, or regulations affecting zoning, land use, and land division. (SAC, Exhibit I, 00093, 00095.) However while paragraph 102 says the title insurance policy issued

"based on" the title report and the preliminary title report is attached and mentions the proposed exclusions, the actual title insurance policy is not attached. What First American would have the court do is to construe the insurance policy without reading the actual language of the contract. I do not believe we can do this on demurrer. Moreover, the proposed policies expressly exclude (from the governmental exclusion) those violations where the violation appears in the public record at the policy date – which is what plaintiffs allege. Paragraph 106 of the Second Amended Complaint further alleges that "the occurrence of the above-described Notice of Violation is covered by the above – referenced policy."

Accordingly, I believe the thirteenth cause of action is sufficient as against a general demurrer.

Uncertainty:

A special demurrer may be made on the ground that the allegations are uncertain. (Code Civ. Proc. § 430.10(f).) Demurrers for uncertainty will be sustained only where the complaint is so bad that the defendant cannot reasonably respond to the complaint, i.e., determine what issues must be admitted or denied or what counts or claims are directed against him or her. Where the demurrer relates to a matter that may be readily clarified through discovery, a demurrer for uncertainty will ordinarily be strictly construed. (*Khoury v. Maly's of Calif*. (1993) 14 Cal.App.4th 612, 616.)

First American's first theory as to why the thirteenth cause of action is uncertain is that plaintiffs have "jumbled together" causes of action for indemnity and breach of contract. However, the cause of action is for "contractual indemnity" and appears to be based on the same contract, i.e., the policy of title insurance, that the breach of contract claim refers to. There is no harm in grouping all the contract claims together.

First American's second theory is that plaintiffs have failed to set forth whether the "contractual" indemnity is express or implied. This level of specificity in pleading is not required. "Equitable indemnity principles govern the allocation of loss or damages among multiple tortfeasors whose liability for the underlying injury is joint and several. [Citations.] Such principles are designed, generally, to do equity among defendants who are legally responsible for an indivisible injury by providing a basis on which liability for damage will be borne by each joint tortfeasor "'in direct proportion to [its] respective fault.'"" (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc*. (2001) 86 Cal.App.4th 1135, 1139-1140.) "The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible." (*Id*. at p. 1139.)

Whether the contractual indemnity is based on express language or to be implied from the contract may be clarified in discovery. The court overrules the special demurrer for uncertainty.

Failure to State Whether Contract is Written or Oral:

A plaintiff must allege whether a contract is written, oral, or implied. Otherwise his or her complaint is susceptible to demurrer under Code of Civil Procedure section 430.10, subdivision (g) [failure to allege whether contract is oral, written or implied is grounds for demurrer to a breach of contract claim].

First American contends that 1) plaintiffs have failed to allege whether the title insurance policy was written or oral; 2) failed to set forth the material terms of the title insurance policy; 3) a title insurance policy does not cover the type of risk encountered, i.e., violation of the Subdivision Map Act.

Plaintiffs plead that the contract that has been breached is a policy of title insurance:

> 102. On or about January 31, 2007, First American provided a Preliminary Report to plaintiffs and thereafter provided plaintiffs with a policy of title insurance based on said Preliminary Report….
> 103. By the express terms of the above-mentioned policy, First American insured plaintiffs against any loss or damage sustained or incurred by plaintiffs by reason of on [sic] marketability of the title to a fee estate in the real property described herein at the date of the closing of the sale of the Subject Property.

The pleading does not state whether the policy of insurance was written or oral. Plaintiffs' rambling opposition fails to even address this point. The court sustains the special demurrer for failure to state whether the policy of title insurance was written or oral.

As to the allegations that the complaint fails to set froth the material terms of the title insurance policy, the material terms are found in paragraphs 103. As to the allegation that the title insurance policy does not cover the type of risk encountered, i.e. a Subdivision Map Act violation, see above.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/22/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Hudson v. Yates***
Case No. 12 CE CG 01097

Hearing Date: January 23rd, 2013 (Dept. 502)

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To grant the motion for summary judgment in part and deny in part. (CCP § 437c.) To grant the motion for a judgment setting aside the court's orders in case no. 09 CE CG 02017 sustaining the demurrer of defendants Montano and Pleasant Valley State Prison and dismissing the action as to them, as the orders are void for lack of jurisdiction and thus are subject to collateral attack at any time. (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950, 126 Cal.Rptr. 805, 809, 544 P.2d 941, 945; see generally 5 Witkin, Cal.Procedure (2d ed. 1971; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc*. (1984) 155 Cal.App.3d 381, 385-86.))

To deny the motion for summary judgment as to defendant Yates, since his default was never taken in the original case and thus the order sustaining the demurrer and dismissing the action was valid as to him.

To deny the plaintiff's motion to the extent he seeks entry of default judgment and money damages against all defendants, as the second amended complaint does not contain any factual allegations to support the prayer for money damages and plaintiff has failed to offer any evidence to support the claimed damages.

To order the parties to litigate any further issues, such as the amount of damages, motions to set aside the defaults of Montano and Pleasant Valley, etc., in the original action. Since the court intends to grant the relief requested in the second amended complaint, the present action has served its purpose and no further relief will be granted in the action.

Explanation:

First of all, the motion is procedurally defective in that plaintiff has not submitted a separate statement of undisputed material facts in support of his motion. A separate statement is mandatory in all motions for summary judgment, and failure to submit a statement is, in itself, a valid ground for denial of the motion in the court's discretion. (CCP § 437c(b)(1); *Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 671, recognized as abrogated on other grounds in *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594.) In fact, in most cases courts will not even consider a motion for summary judgment without a separate statement, unless the case involves a

single, simple issue with minimal evidentiary support. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335, superseded by statute on another point, as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4.)

Here, plaintiff has not submitted a separate statement of undisputed material facts on which he relies to support his motion. However, the issues of the case are simple enough that the court can overlook the lack of a separate statement and hear the merits of the motion despite the absence of the statement. Plaintiff essentially seeks an order declaring the court's prior order sustaining the demurrer and dismissing the action to be void, since defendants Montano and Pleasant Valley had already been defaulted before the demurrer was filed. This is a fairly simple issue of law that does not require the consideration of much evidence other than the documents that are already in the court's file, which are subject to judicial notice under Evidence Code § 452(d) and are not reasonably subject to dispute.

Furthermore, as discussed in detail below, it does appear that the court in the original action acted in excess of its jurisdiction in sustaining the demurrer as to Montano and Pleasant Valley, since they had already been defaulted and thus they had no right to demur to the complaint. It was a clear error for the court to sustain the demurrer and dismiss the action as to the defaulted defendants, so this court intends to rule on the present motion to correct the erroneous order. Therefore, even though the plaintiff has not submitted a separate statement in compliance with CCP § 437c(b)(1), the court intends to exercise its discretion to hear the motion.

With regard to the merits of the motion, the court intends to find that the order sustaining the demurrer and dismissing the complaint as to defendants Montano and Pleasant Valley in the underlying case was made in excess of the court's jurisdiction, and thus is void and subject to collateral attack. "Collateral attack is proper to contest lack of personal or subject matter jurisdiction or the granting of relief which the court has no power to grant (citations omitted)." (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950, 126 Cal.Rptr. 805, 809, 544 P.2d 941, 945; see generally 5 Witkin, Cal.Procedure (2d ed. 1971) Attack on Judgment in Trial Court, s 10, pp. 3590, 3591.) Here, Montano and Pleasant Valley had already been defaulted before they filed their demurrer, so the court had no jurisdiction to consider their demurrer and it should not have sustained the demurrer or dismissed the action as to them. Thus, the orders are void for lack of jurisdiction, and are subject to collateral attack.

"The entry of a default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered. [Citations.] 'A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial or demand notice of subsequent proceedings.' [Citation.] And, even where a default judgment is 'vacated, it would be the duty of the court immediately to render another of like effect, and the defaulting defendants would not be heard for the purpose of interposing any denial or affirmative defense.'

[Citation.]" (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-86.)

"The subsequent untimely filings by appellant and motions made by respondent did not affect the duty of the clerk to enter default when requested, nor did they restore the jurisdiction to the court which was lost when default should have been entered… The municipal court thereafter lost jurisdiction to do anything but enter the default and judgment." (*W. A. Rose Co. v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County* (1959) 176 Cal.App.2d 67, 72.)

Here, defendants were personally served by plaintiff on February 3rd, 2010. (Proofs of service filed in case no. 09 CE CG 02017. The court intends to take judicial notice of the documents in the original case file under Evidence Code § 452(d).) Defendants failed to answer or demur to the petition or complaint within 30 days. The clerk entered default against defendants Montano and Pleasant Valley, although not defendant Yates, on March 18, 2010. (See request to enter default filed on March 18, 2010 in case no. 09 CE CG 02017.) Defendants did not file their demurrer to the petition until April 8th, 2010, several weeks after the default of Montano and Pleasant Valley had been entered. (Demurrer filed April 8th, 2010 in case no. 09 CE CG 02017.)

Therefore, Montano and Pleasant Valley had no right to appear in the action other than to move to set aside the default, and the court had no jurisdiction to consider their demurrer. As a result, the order sustaining the demurrer as to Montano and Pleasant Valley and dismissing the case as to all parties was void, and the court intends to grant the order setting it aside. However, the order was valid as to defendant Yates, who was not defaulted, so the court will allow the order sustaining the demurrer and dismissing the case as to Yates to stand.

Defendants have argued in opposition that plaintiff is simply re-arguing the same contentions he made in his petition for writ, which the court has already denied. However, this is a misreading of the motion for summary judgment, which relates to the issue of whether the court should have sustained defendants' demurrers and dismissed the original action. The writ petition filed by defendant and recently denied by the court related to plaintiff's attempt to enter defendants' defaults in the present case for their alleged failure to answer the second amended complaint. Therefore, the court's order denying the writ petition does not prevent the court from granting the motion for summary judgment, which relates to the defendants' defaults in the original case.

On the other hand, the court will not grant the plaintiff's request to enter judgment on the original complaint in the underlying case, since that case is separate from the present matter, and the complaint/petition in the present case does not contain any allegations that would entitle plaintiff to monetary damages. (See second amended complaint filed October 4th, 2010.) Nor has plaintiff pointed to any evidence that would entitle him to the money damages he seeks. While plaintiff requests $20,000 in damages plus filing fees and service of process fees based on the requests in the first or second amended complaints, he has not made any effort to "prove up" his damages or show why he is entitled to any money damages against defendants.

Therefore, the court intends to deny the request for money damages for lack of evidentiary support.

Instead, the court intends to grant the motion only as to the request to set aside the court's prior orders sustaining the demurrer and dismissing the original case as to defendants Montano and Pleasant Valley. The court intends to set aside the order as to Montano and Pleasant Valley, but not as to Yates, who was never defaulted. Also, the court intends to order the parties to proceed in the original action as to any future litigation, such as motions to set aside the defaults of Montano and Pleasant Valley, applications to prove up damages on the defaults, etc. Since the present action has served its function by obtaining a judgment to set aside the void orders in the original case, there is no need to conduct any further litigation in the present case.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB (Judge's initials) on 1/18/13 (Date).

03

Tentative Ruling

Re: ***Youel v. Davison Design & Development, Inc.***
Case No. 11 CE CG 04197

Hearing Date: January 23rd, 2013 (Dept. 502)

Motion: Defendant's Demurrer to Second Amended Complaint

Tentative Ruling:

To overrule the demurrer to the first cause of action in the second amended complaint. (CCP § 430.10(e).) To order defendant to file and serve his answer to the SAC within ten days of the date of service of this order.

Explanation:

Defendant's sole ground for demurring to the breach of contract claim is that the claim is barred by the statute of limitations, since more than four years passed between the alleged breach of contract and the filing of the complaint in December of 2011. Yet a demurrer based on the statute of limitations will only lie where it is clear from the allegations of the complaint that the statute has run. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) "A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]" (*Ibid*.) The plaintiff's cause of action accrues for purposes of the statute of limitations when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause. (*Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119.)

Here, the relevant statute of limitations on the breach of contract claim is four years, since the plaintiff has alleged the breach of several written agreements. (CCP § 337.) Plaintiff alleges that he entered into three separate written agreements with defendant, two on February 17th, 2005, and one on June 1st, 2005. (SAC, ¶¶ 3.5, 3.7, 3.8.) However, plaintiff does not clearly allege the dates on which he discovered or should have discovered that the contracts were breached. (*Ibid*.) Plaintiff does, however, allege that he discovered defendant's fraud on February 26th, 2010, which is when defendant's employee told plaintiff that defendant would no longer present or approach any company about his invention. (*Id*. at ¶ 3.11.) Since the alleged date of discovery of the fraud and the breach of contract appear to be the same, and since the date of discovery is less than four years before the filing of the complaint, the allegations of the complaint do not clearly show that the statute of limitations has run on plaintiff's claim for breach of contract. Therefore, the court intends to overrule the demurrer.

Defendant argues that the first agreement with plaintiff provided that defendants would create a product report for plaintiff within "approximately three to four weeks" of the execution of the first agreement, which was signed on February 17th, 2005. (SAC, ¶ 3.5, and Exhibit B to SAC.) Thus, plaintiff should have known that the agreement had been breached by late March of 2005, at the latest. However, the agreement attached to the complaint does not state when the defendant would start to prepare the report, and it is not clear that the defendant was going to prepare the report within three to four weeks of the execution of the agreement. (Exhibit B to SAC.) Nor does it appear that the somewhat vague statement that the report would be prepared in "approximately three to four weeks" is enough to show that the complaint is barred by the statute of limitations.

Also, while defendant argues that plaintiff knew or should have known by February 27th, 2007 that defendant had breached the agreements because defendant presented a different device to plaintiff at that time, Exhibit E to the second amended complaint shows that the device presented by defendant was called "Cleanpak, aka Telephone Pleasant Perfume." (Exhibit E to SAC, p. 1.) Therefore, it is not clear from the allegations of the SAC that plaintiff knew or should have known when the defendant presented the "Cleanpak" device to him that the device was different from his invention, or that defendant had breached the agreements. Plaintiff may have believed that defendant had simply changed the name of the product, rather than the design. Therefore, the cause of action did not necessarily accrue on February 27th, 2007. As a result, the court intends to overrule the demurrer to the first cause of action, since it is not clear from the allegations of the SAC that the statute of limitations has run on the breach of contract cause of action.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/18/13.
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***Catrell Bakari v. Foster Poultry Farms, Inc.***
Case no. 11CECG04408

Hearing Date: **January 23, 2013 (Dept. 502)**

Motion: By defendant: (1) to compel responses to certain form and special interrogatories, request for production of documents, and for an order deeming admissions, and for monetary sanctions; and (2) for terminating sanctions

Tentative Ruling:

(1) To grant the motion to compel responses to the form interrogatories. Plaintiff is ordered to provide complete verified responses, without objection, within 10 days of service of this order.
(2) The court denies without prejudice the motion to compel responses to the special interrogatories, and requests for production and admissions.
(3) Monetary sanctions are denied in connection with the motion to compel.
(4) To deny without prejudice the motion for terminating sanctions.

Explanation:

Motion to compel and monetary sanctions

California Code of Civil Procedure (CCP) sections 2030.260(a), 2031.260(a), and 2033.250(a) provide that the deadline for responding to interrogatories, requests for production of documents, and requests for admissions, respectively, is 30 days after the service of such discovery.

On September 21, 2012 defendant propounded the subject form interrogatories (general and employment) on plaintiff. Counsel for defendant, Bauer, represents that as of the date of his supporting declaration, November 7, 2012, plaintiff had not responded to the general and employment form interrogatories. Under CCP section 2030.290(b) when a party has failed to submit timely responses to written interrogatories the court may enter an order compelling such responses. An order compelling defendant to provide responses without objections is warranted. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404.)

However, the notice of motion states that it was not until October 11, 2012 that defendant propounded on plaintiff, by U.S. mail, the subject special interrogatories and requests for production and admissions. Defendant filed his motion to compel responses to the special interrogatories and requests for production and admissions before the statutory expiration of the deadline for plaintiff to file responses. The fact that the discovery was returned to defendant as unclaimed, unable to forward, etc.

does not justify filing the motion prematurely. Therefore, the court denies the motion to compel responses to the special interrogatories, and requests for production and admissions. Monetary sanctions are denied in connection with the motion to compel responses to entire subject discovery.

Terminating sanctions

The purpose of discovery sanctions "is not 'to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits,' " (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303), but to prevent abuse of the discovery process and correct the problem presented (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482; *Fred Howland Co. v. Superior Court* (1966) 244 Cal.App.2d 605.) "One of the principal purposes of the Discovery Act . . . is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits*. [Citations.]" (*Caryl Richards, Inc. v. Superior Court*, *supra*, 188 Cal.App.2d at p. 303, italics in original.)

The courts therefore frown upon the extreme sanction of *dismissal* of a case for failure to make discovery, and recommend instead lesser sanctions of fines. (See, e.g., *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793; *Wilson v. Jefferson* (1985) 163 Cal.App.3d 952, 958.) In *Deyo*, the court stated that "[t]he penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Deyo v. Kilbourne*, *supra*, 84 Cal.App.3d at p. 793.) Also, ". . . the sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause. [Citations.]" (*Ibid.*)

Cases which have disapproved discovery sanctions for being out of proportion to the sanctioned conduct include *Wilson v. Jefferson*, *supra*, 163 Cal.App.3d at page 958 where the court reversed a sanction consisting of striking the answer and entering a default, despite a showing of a " 'continuing history of flaunting discovery requirements,' " because the penalty was found not " 'appropriate to the dereliction.' " The court observed there were many aspects of the case not connected with the dereliction, and a lesser sanction would have been appropriate.

At this point in the litigation, terminating sanctions are too extreme. Therefore, the motion for terminating sanctions is denied without prejudice.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/18/13.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(5)

Tentative Ruling

Re: ***Pochelu et al. v. Myers et al. and related Cross-Action***
Superior Court Case No. 12 CECG 02144

Hearing Date: January 23, 2013 **(Dept. 503)**

Motion: By Plaintiffs for Trial Setting Preference

Tentative Ruling:

To grant the motion and set the trial for **April 29,2013, in Dept. 501 at 9 am.**

Explanation:

This case stems from allegations of a fraudulent transfer of the Deed to the Plaintiffs' home. On July 9, 2012 Plaintiffs filed a verified Complaint seeking to quiet title and cancel the Deed of Trust as well as injunctive relief and recovery on a California notary bond. In addition, Plaintiffs alleged causes of action for violation of Gov. Code § 8214.1(g) and Bus. & Prof. Code § 6215 as well as fraud and financial abuse of an elder. All Defendants have filed Answers.

On December 10, 2012 both Plaintiffs filed a motion seeking trial setting preference on the grounds that they are over 70 years of age and are being treated for various medical conditions. No opposition was filed.

CCP § 36. Motion for preference; Time of trial; Continuance states in relevant part:

(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:

(1) The party has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

(c) Unless the court otherwise orders:

(2) At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference.

(f) Upon the granting of such a motion for preference, the court shall set the matter for

trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

The Declaration of John Pochelu states that he is 93 years of age and suffers from various debilitating medical conditions. See Declaration at ¶¶ 2-5. The Declaration of Marian Pochelu states that she is 88 years of age and also suffers from various debilitating medical conditions. See Declaration at ¶¶ 2-5. The Declarations of the Plaintiffs meet the requirements set forth in CCP § 36 (a)(2)-- the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. Accordingly, the motion will be granted.

Pursuant to California Rules of Court, rule 3.1312, subd.(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 1/22/2013.
(Judge's initials) (Date)